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Comptroller General
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Matter of: TRW, Inc.

File: B-282162; B-282162.2

Date: June 9, 1999

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Joshua A. Kranzberg, Esq., and James R. McMurry, Esq., Department of the Army, for the agency.
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DIGEST

1. Agency's evaluation of the awardee's past performance was reasonable where the agency investigated and evaluated each of the contracts referenced in the awardee's proposal; other information regarding the awardee's allegedly deficient prior performance on subcontracts was not so "close at hand" that it had to be considered by the agency.
2. Protest that the agency's cost realism evaluation of the awardee's proposal was unreasonable is denied where the evaluation was detailed, well-documented, and reasonably performed, and the protester only generally asserts that the awardee's proposed staffing level may be too low.
3. Protest that the agency should have excluded the awardee from the competition because a subcontractor, proposed by the awardee in its initial proposal but omitted from its revised proposals, allegedly has a conflict of interest is denied where the subcontractor did not participate in the preparation of the solicitation and there is no substantial evidence establishing that the awardee obtained an unfair competitive advantage from the subcontractor's participation in the preparation of the awardee's initial proposal.

DECISION

TRW, Inc. protests the award of a contract to Motorola, Inc. under request for proposals (RFP) No. DAAH01-98-R-0424, issued by the Army Aviation and Missile Command (AMCOM), Department of the Army for tactical operations centers (TOC). TRW argues that the agency's evaluation of Motorola's past performance and cost proposals was unreasonable. TRW also contends that the award to Motorola was improper due to a conflict of interest involving one of the subcontractors initially proposed by Motorola.

We deny the protest.

TOCs consist of integrated groupings of wheeled and/or tracked vehicles that are connected by large tent-like shelters. Contracting Officer's Statement at 1. TOCs house various communication and data processing equipment, including a local area network, intercom, and large screen displays. The purpose of a TOC is to provide a battlefield commander with an overall view of tactical operations forces, and allow the commander and staff to plan, monitor, and direct the operations of the forces. Id.

The RFP provided for the award of a cost-plus-fixed-fee contract for the upgrade, digitization, and standardization of 64 existing TOCs. Id.; RFP § L-7. The RFP stated that award would be made to the offeror submitting the proposal representing the best value to the government, considering management, technical, cost, and past performance evaluation criteria. RFP amend. 1, § M-3. The RFP stated that technical was more important than cost, that cost was more important than management, and that management was significantly more important than past performance. Id. The RFP added that cost, management, and past performance together were more important than technical, and that all evaluation criteria other than cost were significantly more important than cost. Id.

The agency received three proposals, including Motorola's and TRW's, by the RFP's closing date. Agency Report at 3. The proposals were evaluated, and all three proposals were included in the competitive range. Agency Report, Section D, tab 1.f, Determination of Competitive Range at 15. Discussions were held, and revised proposals were received and evaluated. Agency Report, Section D, tab 2.a. Updated cost proposals were subsequently requested, and following their receipt, the agency requested and received best and final offers (BAFO) from the offerors. Agency Report, Section D, tabs 2.b. and 2.c.

TRW's and Motorola's BAFOs were each rated as "good" under the technical and management criteria, and "low risk" under the past performance criterion, at evaluated costs of \$55,691,732 and \$49,323,820, respectively. Agency Report, Section D, tabs 2.e.1., 2.e.2., 2.f.1., 2.f.2. The source selection authority (SSA) determined

that the proposals of TRW and Motorola were essentially equal in merit,¹ and selected Motorola for award because of its proposal's lower evaluated cost. Agency Report, Section D, tab 2.g., Memorandum For Record, at 16-17. After being informed by the agency that the contract had been awarded to Motorola, and requesting and receiving a debriefing, TRW filed this protest.

TRW first protests the agency's evaluation of Motorola's proposal under the past performance evaluation criterion as "low risk." Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of an offeror's past performance is primarily a matter within the contracting agency's discretion. Pacific Ship Repair and Fabrication, Inc., B-279793, July 23, 1998, 98-2 CPD ¶ 29 at 3.

The RFP set forth detailed instructions for the preparation of proposals, and requested, among other things, that proposals include a separate past performance volume. RFP amend. 2, § L-22, Volume IV. This volume was to include "past performance information regarding similar federal, state, and local government contracts, key personnel, and major subcontractors contracts." Id., ¶ A. Each offeror was required to "submit a description of up to 5 government contracts including prime contracts and major subcontracts received or performed during the past 3 years, which are similar to the effort required by the solicitation, or which offerors consider relevant in demonstrating their ability to perform the proposed effort." Id., ¶ A(1).

The RFP informed offerors that the evaluation of past performance would involve the consideration of "the offeror's record of past and current performance to ascertain the probable ability to successfully perform the required effort of this solicitation." RFP amend. 2, § M-4.IV. The RFP added that "[w]hile the Government may elect to consider data obtained from other sources, the burden of providing thorough and complete past performance information rests with the offeror." Id.

The past performance volume of Motorola's proposal provided information on two projects Motorola had performed, and three projects performed by its major subcontractors. Agency Report, Section D, Tab 1.j., Performance Risk Assessment, A.1. One of the projects reflected Motorola's performance as a subcontractor to TRW on an Army contract for work on seven TOC shelters. The past performance volume of Motorola's proposal was forwarded to the cognizant performance risk assessment group (PRAG) for evaluation. Id.

The PRAG sent past performance questionnaires to "technical" and "contract" points of contact for the projects referenced. The questionnaires set forth a series of

¹TRW's slight technical superiority was offset by Motorola's management superiority. Agency Report, Section D, tab 2.g., Memorandum For Record, at 16

background questions concerning the relevant project's size, scope, contract type and value, period of performance, and the overall nature of the effort, followed by a series of questions under the following headings: technical/management performance; subcontractor control; cost/price; schedule/delivery capability; and management. The PRAG adds that "[f]ollow-up calls were made to expedite the delivery of questionnaires, answer questions, and validate the information provided." Agency Report, Section D, Tab 1.j., Performance Risk Assessment, A.1.

The PRAG concluded, based upon the responses, that Motorola "has experience in all technical areas covered by the [RFP's] statement of work," and that "there is little doubt that [Motorola] can perform the required effort based on its performance record." Agency Report, Section D, tab 1.j., Performance Risk Assessment, A. In explaining this conclusion, the PRAG noted that "[o]n all surveys, [Motorola] was cited as being cooperative in negotiations and in resolving issues." Id., A.1. The PRAG also referred to the fact that the completed questionnaires universally rated Motorola's performance as "low risk," and that in the questionnaires Motorola "was cited for the ability to capture a highly skilled workforce, having a strong management team, being responsive to customer requirements, being cooperative, and pleasant to work with." Id.

The protester does not challenge the reasonableness of the agency's conclusion that Motorola's past performance merited a rating of "low risk" based upon the information reviewed. Rather, TRW contends that Motorola, in its role as a subcontractor to TRW on three other Army contracts for TOC work, performed poorly and that the Army was aware of this poor performance because of certain conversations between TRW and Army personnel. The protester contends that, even though Motorola did not reference its performance of these three subcontracts in the past performance volume of its proposal, the agency was required to consider Motorola's allegedly poor performance as TRW's subcontractor in its past performance evaluation, and downgrade Motorola's proposal accordingly. Protest at 19-21.

While agencies generally need not evaluate all past performance references or those not reflected in the proposals, our Office has recognized that in certain limited circumstances an agency evaluating an offeror's past performance has an obligation (as opposed to the discretion) to consider "outside information" bearing on the offeror's past performance. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. Where we have charged an agency with responsibility for considering such outside information, the record has demonstrated that the information in question was "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information." Id.; see GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14 (agency should have considered offeror's performance of a prior contract where the contract was discussed in the offeror's past performance proposal, was so relevant as to have served as the basis for the government estimate for the subject solicitation, and the contracting officer's technical representative for

the contract was a member of the technical evaluation team for the subject solicitation); G. Marine Diesel, B-232619.3, Aug. 3, 1989, 89-2 CPD ¶ 101 at 4-6 (contracting officer that was personally aware of the awardee's continuing difficulties in performing a contract for services related to the subject solicitation, and considered the performance difficulties relevant to the extent that the contracting officer determined not to exercise the options in the contract awarded under the subject solicitation, erred in not considering the awardee's performance difficulties when determining whether the contract under the subject solicitation had been properly awarded); G. Marine Diesel; Phillyship, B-232619, B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90 at 4-5 (agency should have considered awardee's prior experience under a directly relevant contract where the contract was referenced in the awardee's proposal and the agency personnel were familiar with the awardee's performance). However, the "close at hand" information in these cases generally concerned contracts for the same services with the same procuring activity, or at least information personally known to the evaluators. See Morrison Knudsen Corp., B-280261, Sept. 9, 1998, 98-2 CPD ¶ 63 at 5-6.

Here, the contracts on which Motorola's performance was allegedly unsatisfactory were between Motorola and TRW, with Motorola acting as a subcontractor and TRW as the prime contractor to the agency; they were not contracts between Motorola and the same procuring activity, such that the agency would necessarily have information concerning Motorola's prior performance close at hand. Additionally, the documentation provided by TRW in support of its contention regarding Motorola's performance on its subcontracts with TRW provides little support for TRW's claim. See Protester's Comments, Apr. 19, 1999, at tab 9 and exhs. A-B. While the documents reflect that the contracts between TRW and Motorola were modified, there is only one document that reflects any concerns over the quality of the work performed. Id. The concerns mentioned here appear to be relatively minor in nature and are not, with the exception of an affidavit submitted by a TRW employee, identified as attributable to work done by Motorola. In sum, the record does not demonstrate that there was outside information so "close at hand" regarding Motorola's prior performance that the agency either improperly ignored or erroneously failed to obtain.

TRW also protests that the agency's evaluation of Motorola's cost proposal was unreasonable. When an agency evaluates a proposal for the award of a cost reimbursement contract, an offeror's proposed estimated costs are not dispositive, because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1); 15.404-1(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. FAR 15.404-1(d)(2); McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 25. Because the contracting agency is in the best position to make this cost realism determination, we review an agency's judgment in

this area only to see that the agency's cost realism evaluation was reasonably based and not arbitrary. Infotec Dev. Inc., B-258198 et al., Dec. 27, 1994, 95-1 CPD ¶ 52 at 6.

The record reflects that the agency performed a detailed cost realism analysis of the offerors' proposals. For example, in analyzing each proposal, the cost evaluation team coordinated with the cognizant management and technical evaluation teams to consider the number and mix of labor hours proposed for the prime and subcontractors in conjunction with the offerors' technical and management approaches to determine the impact on the relevant offeror's technical and management approaches and most probable cost. The cost evaluation team also reviewed the proposed direct and indirect costs, including costs for labor, material, handling, travel, freight, reproduction, receiving, cost of money, and general and administrative costs as well as other direct and indirect costs. Agency Report, Section D, tabs 1.h.3 and 2.e.2. The Defense Contract Audit Agency (DCAA) also audited Motorola's initial proposal, and the results of DCAA's audit were considered and incorporated into the agency's cost realism analysis of Motorola's proposal. Agency Report, Section D, tab 2.e.2. Based on our review of this record, we find no basis to question the adequacy of the agency's cost realism analysis.

In contending that the agency acted unreasonably, TRW focuses on the fact that Motorola reduced its initial proposed costs from \$54,387,992 to \$44,881,638 in its BAFO. TRW's protest and comments assert that Motorola's labor costs must be understated because Motorola's BAFO reflects a lower cost and less hours than Motorola initially proposed.

Motorola's BAFO included a separate cost volume, detailing the bases for this reduction. The cost volume included, among other things, a narrative summary setting forth the reasons for the cost reduction, a lengthy and detailed "summary delta report by [contract line item/work breakdown structure]," and a revised cost proposal. Agency Report, Section C, tab 4.b, Motorola's Feb. 16, 1999 Cost BAFO. Motorola explained here that its cost reduction was the result of, among other things, price agreements with its subcontractors, a reduction in management/engineering hours "resulting from further streamlining and pre-award design work," as well as a revision of its labor skill mix and a consolidation of its training efforts. Id., BAFO summary, at 1st unnumbered page.

Although Motorola's BAFO costs were initially accepted by the agency with a relatively minor adjustment, the agency subsequently determined that the reduction in Motorola's proposed costs, which was in part the result of a reduction of costs proposed by one of Motorola's subcontractors, was not fully explained. Contracting Officer's Statement at 13. The agency consequently determined that the most probable cost of Motorola's proposal was \$49,323,820. Id.

We conclude that, contrary to TRW's contentions, the record shows that the agency carefully reviewed Motorola's explanation in its BAFO justifying the lower staffing level--an explanation that is not challenged by TRW. Moreover, TRW's arguments do

not take into account the fact that some of the labor hours are part of Motorola's BAFO subcontractor costs. More importantly, TRW has not explained why the proposed staffing level was not appropriate for Motorola's technical approach, stated what probable cost adjustments should have been made to Motorola's costs, or specifically challenged any other aspect of the agency's cost analysis. Under the circumstances, TRW's challenge to this aspect of the agency's evaluation constitutes, at best, its mere disagreement with the evaluation results, and as such, does not provide a basis to find the evaluation unreasonable. Global Assocs., Ltd., B-275534, Mar. 3, 1997, 97-1 CPD ¶ 129 at 9; Motorola, Inc., B-254489, B-254489.2, Dec. 15, 1993, 93-2 CPD ¶ 322 at 11.

TRW finally contends that Motorola is ineligible for award because Computer Sciences Corporation (CSC), one of the subcontractors initially proposed by Motorola, had an impermissible conflict of interest because of CSC's role as the current technology, engineering and integration contractor supporting the Program Executive Office for Command, Control, and Communication Systems (PEO C3S).²

The protester first informed the agency of its concerns regarding CSC by letter dated October 19, 1998. TRW stated in that letter that it understood that "CSC's contract with the Government contains an organizational conflict of interest clause, which . . . limits its participation with respect to bidding related contract work that may give the company an unfair competitive advantage." TRW added that "due to CSC's . . . contract, it may have been in a privileged position to obtain TOC competition sensitive data that is relevant to the [subject] RFP," and requested that the agency review TRW's concerns and "take appropriate action to ensure the competitive fairness under the TOC procurement." Agency Report, Section F, tab f.1.

TRW's letter was provided to the ADCCS PO on October 20, and that office confirmed that the CSC contract in support of PEO C3S did have a clause pertaining to organizational conflicts of interest (OCI). Agency Report at 3; Agency Report Section F, tab f.2. The ADCCS PO office added that no action would be taken until a proposal identifying CSC as a subcontractor was received. Id.

Motorola's initial proposal, received by the agency on November 4, identified CSC as one of its proposed subcontractors. As a result of TRW's letter and CSC's identification as one of Motorola's subcontractors, AMCOM telephoned the contracting officer responsible for CSC's contract in support of PEO C3S on November 17, and on November 18 sent the contracting officer a copy of TRW's

²The agency explains that PEO C3S, located at Fort Monmouth, New Jersey, is in charge of developing, fielding, and supporting the Army's command, control and communications systems. Agency Report at 3 n.2. The Army Air Defense Command and Control Project Office (ADCCS PO), a subordinate office of PEO C3S and located in Huntsville, Alabama, is the originator of the TOC requirement. Id. AMCOM, the issuer of this RFP, is also located in Huntsville. Id.

October 19 letter and the RFP's TOC specification. AMCOM requested the contracting officer's views as to whether CSC had violated the OCI clause in its PEO C3S contract. The contracting officer was also asked whether there was any evidence of CSC being involved with the writing of technical requirements for the TOC integration. Agency Report at 4; Agency Report, Section F, tab f.3.

On December 2, AMCOM made a second, more formal request for information regarding CSC's potential conflict of interest. Agency Report at 4; Agency Report, Section F, tab f.4. This letter informed the contracting officer responsible for CSC's PEO C3S contract that AMCOM needed to determine whether CSC had violated the OCI clause in that contract, and the impact any violation would have on Motorola's proposal under the subject RFP. *Id.* This letter required that the contracting officer for CSC's PEO C3S contract "determine the involvement of CSC in the presolicitation processes of the Integration of the Army TOCs" by answering certain questions. The questions set forth in the AMCOM letter asked, for example, whether CSC could be tied either directly or indirectly to the presolicitation processes for the Army TOCs, or if CSC could not be directly tied to these processes, whether it could nevertheless possess "'insider' information that would place them in a more favorable competitive situation." *Id.* AMCOM subsequently sent the Program Executive Officer, Command, Control and Communications Systems a letter dated December 14 also requesting information regarding CSC's work in support of PEO C3S, requesting that AMCOM be advised of "the extent of CSC's involvement, and what the involvement was, in the planning, development and writing of the TOC procurement requirement." Agency Report at 4; Agency Report, Section F, tab f.5.

On December 18, AMCOM received a memorandum from an individual employed as the Chief of the Force XXI Integration Office, PEO C3S, regarding CSC.³ This memorandum stated that "CSC has generally been afforded open access to information across PEO C3S," and that in its performance of its support contract, "CSC is clearly in a position to influence technical requirements." Agency Report at 4; Agency Report, Section F, tab f.6. The memorandum added that "[m]uch of the work performed by CSC has directly contributed to the development of the systems architecture for the First Digitized Division," and that an earlier version of the document depicting this architecture "is called out in the TOC RFP." *Id.* The memorandum also provided that CSC had "been active on the Cosite [Integrated Product Team], a body which is identifying methods to optimize radio performance in a congested environment" like TOCs. *Id.* The memorandum concluded with the author stating that he was "unaware of any direct CSC involvement in the planning, development and writing of the TOC procurement requirement, but I cannot deny

³According to a declaration submitted by the Chief of the Force XXI Integration Office during this protest, the Force XXI Integration Office is responsible for planning and implementing the Army's battlefield digitization efforts. Supplemental Agency Report, May 5, 1999, attach. 1 at 1.

that the results of CSC's efforts did not become infused into the requirement indirectly." Id.

On December 30, AMCOM sent a letter to Motorola stating that CSC "appears" to have an OCI because of its contract in support of the PEO C3S. Agency Report at 5; Agency Report, Section F, tab f.7. Specifically, the letter stated that "[b]ecause of its integral involvement in the PEO C3S efforts involving the TOC program, it appears CSC may have violated the OCI clause of [its] contract." Id. The letter added that the "Government questions whether CSC may continue as a member of the Motorola Team." The letter requested that Motorola inform AMCOM of "what actions will be made to eliminate this OCI as soon as possible" and that a "[f]ailure to rectify this situation may cause Motorola's proposal to be considered nonresponsive by the Government." Id.

By letter dated January 6, 1999, Motorola informed the agency that it had "elected to withdraw CSC as a proposed subcontractor," and that "CSC [would] not participate in further proposal efforts or resulting contract performance." Agency Report, Section F, tab f.8. This letter included a detailed description of the responsibilities CSC would have had during contract performance, and how those responsibilities would now be handled. The letter also provided a complete description of the proposal preparation assistance performed by CSC. Id.

Shortly after receiving Motorola's response, the agency was informed by the contracting officer responsible for CSC's contract in support of the PEO C3S, and who had been provided with the RFP's specifications, that in his view CSC did not have a conflict of interest. Agency Report, Section F, tab f.10.

TRW asserts that CSC, because of its performance of the PEO C3S support contract, "had special knowledge of certain TOC requirements that would provide an unfair competitive advantage to the team on which it was a member," as evidenced by the memorandum from the Chief of the Force XXI Integration Office. Protester's Comments, Apr. 19, 1999, at 14. The protester argues that Motorola's removal of CSC from its proposal and reallocation of CSC's responsibilities were insufficient to mitigate the conflict of interest and improper competitive advantage that resulted from CSC's participation as a member of Motorola's "team."

A contracting officer is required to avoid, neutralize, or mitigate a significant potential conflict of interest on the part of prospective contractor before award. FAR § 9.504(a)(2). Substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or potential conflict is not sufficient. RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing "whether a significant potential conflict exists, and, if it does, the development of an appropriate means for resolving it." FAR § 9.505. Inasmuch as

the contracting agency has discretion to determine whether an actual or apparent conflict exists or will arise, and whether the firm should be excluded from the competition, our review of an agency's judgment in this regard is limited to determining whether the agency's conclusions were reasonably based and not arbitrary. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12.

The agency points out that “[n]either the contracting officer, nor anyone else at AMCOM, ever found that Motorola’s relationship with CSC ever constituted an OCI,” and argues that its conclusion that no OCI existed is supported by the record. Agency Report at 10. In this regard, the agency has provided, among other things, a declaration of the Chief of the Force XXI Integration Office, PEO C3S, stating that “CSC was not provided any source selection sensitive information with respect to the TOC acquisition.” Supplemental Agency Report, May 5, 1999, attach. 1 at 2. The declaration adds that any advice received from CSC in its performance of its contract supporting PEO C3S is at a “broad/high level, as opposed to the more intricate details associated with any individual subordinate PEO C3S subsystem such as TOCs.” Id. The Chief of the Force XXI Integration Office also states in the declaration that the product of CSC’s involvement in the Cosite Integrated Product Team and the systems architecture for the First Digitized Division, as referenced in his letter of December 18 to AMCOM, have been posted, respectively, to an agency website (to which more than 30 TRW personnel have access) and made available in the TOCs acquisition reference library (to which all offerors had access). The Chief of the Force XXI Integration Office adds that he reviewed Motorola’s proposal, and concluded “that no value had been added to Motorola’s proposal as a result of CSC’s being my support contractor.” Id. at 4. Specifically, the Chief states the information reviewed “was not of a nature that it could have only been obtained through ‘insider information.’ The information was rather, of a more generally available, rudimentary variety.” Id. Moreover, there is no evidence that CSC communicated proprietary or source selection sensitive information to Motorola as part of the proposal preparation process; as indicated above, Motorola, in its contemporaneous response to the Army’s concerns, stated in detail what contributions CSC made to Motorola’s proposal.

Thus, based on this record, we cannot find the agency’s determination not to exclude Motorola from the competition unreasonable. The record reflects that the agency diligently investigated CSC’s involvement in this procurement and reasonably concluded that there were no hard facts or specific evidence that CSC was directly

involved in the preparation of any aspect of the RFP, or that CSC's initial participation in Motorola's proposal preparation efforts resulted in Motorola having obtained any unfair competitive advantage.

The protest is denied.

**Comptroller General
of the United States**